IN THE

United States Circuit Court of Appeals

FIFTH CIRCUIT

No. 6004

STERLING B. CRAMER, ET AL.,

APPELLANTS,

VS.

WILLIAM E. LAMB,

APPELLEE.

REPLY BRIEF OF APPELLANTS TO BRIEF OF APPELLEE, WILLIAM E. LAMB, ON MOTION TO DISMISS THE APPEAL

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U. S. CIRCUIT COURT OF APPEALS
FILED
JAN 9 1931
Cathy J. Lucas

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The appellee has filed his motion to dismiss the appeal in the above case on substantially two grounds:

1.

The Court is without authority to review the judgment of the Court below because the proceeding in the Court below was a contempt proceeding, and because the contempt proceeding was not maintainable upon the facts alleged in the citation and the petition upon which it was founded.

11.

The decree appealed from is not a final decree, and, therefore, not reviewable by this Court.

Most of the brief of counsel for the appellee is devoted to those legal questions arising out of the contempt phase of the proceeding against the appellee in

the Court below. It would avail us nothing to enter into a moot debate with counsel as to the propriety of that proceeding inasmuch as there is no error assigned by the appellant upon the action of the Court below in dismissing the contempt charge. We cannot see how counsel voluntarily raises supposed error, and contends so vociferously that the contempt proceeding was not maintainable in the Court below, and if maintainable, the action of the Court in disposing of the same is not reviewable here. We can, therefore, for the purposes of this appeal, agree with counsel that the Court was correct in dismissing the contempt charge. This disposes of the first question above mentioned, and practically disposes of the motion to dismiss the appeal.

On the second proposition, to-wit: that the decree appealed from was not a final decree, we ask the Court to bear in mind that the error asserted here on the part of the Court below was his action in dismissing the civil proceeding wherein the appellee had been made a party by supplemental bill or petition and by order of the Court, thereon, and to which he interposed his answer upon the merits. We also ask the court to bear in mind that the proceeding against the appellee here in the Court below was an ancillary proceeding against him seeking civil relief. In addition thereto, there was issued a citation to show cause as for contempt which was answered by way of adopting the answer of appellee to the supplemental bill. The contempt charge has been dismissed, and the Court need pay no further attention thereto for the reason that no error is assigned on the part of the Court in dismissing the citation.

We quote, for the convenience of the Court, the pertinent parts of the record demonstrating the facts above stated; first from that pleading whereby the appellee was sought to be made a party to the original suit, and facts alleged charging him with entering into a conspiracy to defraud, and asking appropriate relief because of his said actions. (R 122, 124, 125, 126).

"To the Honorable E. R. Holmes, Judge, etc.:

"And now come the plaintiffs and show to the Court that in the evidence taken on the final trial in the above styled cause it appears that the defendant, Florence T. Holland, and her agent W. P. Holland, have during the pendency of this litigation and utterly disregarded the rights and privileges of the plaintiffs and the equities in this cause, and the dignity, power and authority of this Honorable Court and in contumacious and contemptuous disregard thereof, have in order to further hinder and delay the creditors of the said W. P. Holland, done the following acts:

* * * *

"4. Plaintiffs allege that Florence T. Holland, the defendant and her said agent, W. P. Holland, conspiring together for the purposes aforesaid, and with the contemptuous disregard etc., aforesaid, together with Messrs. Butler, Lamb, Foster & Pope, their attorneys, and especially William E. Lamb, both said attorneys lastly said having been admitted by this Court as officers of this Court the practice before this Honorable Court disregarding the rights of the plaintiffs herein and the power and authority of this Court have transferred, set over and assigned to the said William E. Lamb of the firm of attorneys aforesaid, a part of the trust fund herein sued for, to-wit: approximately Ninety Thousand Dollars ($90,000.00) of said trust fund. Plaintiffs allege that the said attorneys and all the parties concerned in said transfer actually and constructively knew that the said property and money so transferred was a part of the trust fund herein sued for held by the defendant under the power and direction of this Court to be disposed of only with the equities of all parties in view and by order and consent of this Honorable Court.

"5. Plaintiffs allege that in the scramble to contemptiously and contumaciously get rid of all the property herein sued for, and upon which the plaintiffs claim lien, all of which was and is in the constructive possession and under the power and authority of this Court, the defendant and her agent, and attorneys have transferred in manner not now known to the plaintiffs, various other monies and property by convenous practices and fraudulent schemes so that now it appears from the statement of the defendant and her agent upon the witness stand that the bulk of the estate herein sued for has been dissipated during the pendency of this litigation and while under the authority of this Court in utter and complete contemptuous and contumacious disregard of this Court of Equity and its power, right and authority."

* * * *

"Therefore, and for the further purpose if the same shall appear necessary of canceling and setting aside the various alleged covenous, fraudulent and nefarious transfers aforesaid, that this Honorable Court, for the purpose of carrying out and effectuating such decrees this Honorable Court may render in the main cause herein, that each all and every of above mentioned parties, and other parties who may appear to be concerned in the said transfers, be made parties to cause, by proper process returnable as required by law, and that upon final hearing hereof your Honor grant to the plaintiffs full and complete general relief herein as to equity may seem meet, but that in the meantime your Honor may issue herein said temporary restraining order as may appear necessary to prevent the further transfer by gift, or otherwise, of the corpus of the estate herein sued for, and that such temporary restraining order be supplemented by writs of injunction to be granted hereinafter, permanently and wholly restrainig and enjoining all per-

sons from further transferring and disposing of the property sued for, and/or involved in this litigation."

Upon the filing of the pleading quoted from above, the Court entered an order whereby the appellee was formally made a party to the suit in the court below. (R. 130).

"It is further ordered that a copy hereof be delivered to the Marshal of this Court to be by him personally served upon each of the above named defendants, and that pursuant thereto that said named parties be made parties to this cause and do herein appear and show cause why that by plaintiffs asked should not be done, and why that the essential to maintain the dignity and authority of this Court be not performed.

"Ordered, adjudged and decreed this April 21st, 1930."

Therefore, it will be observed, upon the filing of the above mentioned pleading and the entry of the above mentioned order, that appellee stood as a party defendant charged with defrauding appellants out of some ninety-odd thousand dollars.

By proper answer to the pleading above mentioned, the appellee filed his answer upon the merits and set up various and sundry affirmative defenses and affirmative theories of defense. (R. 147-172.)

Such procedure is in strict accord with both the practice and rules of this court. We refer to Rule 34 of the Equity Rules. In the final analysis the proceeding in the court below was, in its nature, the simplest sort of procedure. It appeared, during the trial of the cause, that the appellee had committed acts which the appellant alleged to be fraudulent as to them, and out of which appellants alleged they suffered damages to the extent above stated. Thereupon, a pleading was filed charging

such facts, and asking that the appellee be made a party, and an order was entered making him a party, and he answered to the merits. Upon his subsequent motion, the Court finally dismissed the proceeding as against the appellee, discharging him finally, and taxed the appellants with the costs of the proceeding as against the appellee.

We, therefore, arrive at the issue between counsel, it being asserted on the one part, by counsel for appellee, that such a decree is not a final decree, and, therefore, not reviewable here, and on the other part, by counsel for appellants, that such decree is a final decree and is reviewable.

It is said that because the decree preserves the right of the appellants to proceed otherwise as against the appellee, it is not final. We submit that any decree which finally disposes of any given case is a final decree. The identical question has been recently discussed by the Supreme Court and, we submit, finally settled. The Court will recollect that, under Section 238 of the Judicial Code prior to the amendment of May 13, 1925, a direct appeal lay to the Supreme Court from a district court in any case in which the jurisdiction of the district court was in issue. Such appeal, by a very long line of decisions of the Supreme Court, lay only in cases of final decrees.

In the case of **Wilson v Republic Iron & Steel Company, et al, 257 U. S. 92, 66 L. Ed. 144,** the identical question was urged upon the Supreme Court, that is that, inas much as the decree did not operate as a bar to a further action, it was not final. We answer the question in the language of the Court:

> "Of course, the review can be had only after a final judgment. McLish v. Roff, 141 U. S. 661, 35 L. Ed. 893, 12 Sup. Ct. Rep. 118. But a judgment of dismissal, such as is shown here, is a final judgment That it leaves the merits undetermined and may not be a bar to another action does not make it interloc-

utory. It effectually terminates the particular case, prevents the plaintiff from further prosecuting the same, and relieves the defendant from putting in a defense. This gives it the requisite finality for the purposes of a review. Wecker v. National Enameling & Stamping Co. 204 U. S. 176, 181, 182, 51 L. Ed. 430, 434, 435, 27 Sup. Ct. Rep. 184, 9 Ann. Cas. 757; Detroit & M. R. Co. v. Michigan R. Commission, 240 U. S. 564, 570, 60 L. Ed. 802, 807, 36 Sup. Ct. Rep. 424; McAllister v. Chesapeake & O R. Co. Supra; Colorado Eastern R. Co. v. Union P. R. Co. 36 C. C. A. 263, 94 Fed. 312."

The form of the decree appealed from here is that the process is quashed, the petition dismissed, appellants charged with the costs and the defendant allowed to go without day.

That such a decree is final and appealable has also recently been decided by the Supreme Court in the case of **Rosenberg Bros. & Co. v. Curtis Brown Co.** 260 U. S. 516, 67 L. Ed. 372. We quote from the opinion of the Court in that case:

"Rosenberg Brothers & Company, Incorporated, a New York corporation, brought this suit in the Supreme Court of that state against Curtis Brown Company, an Oklahoma corporation. The only service of process made was by delivery of a summons to defendant's president while he was temporarily in New York. Defendant appeared specially; moved to quash the summons on the ground that the corporation was not found within the state; and, after evidence was taken, but before hearing on the motion, removed the case to the Federal Court for the Western District of New York. There, the motion to quash was granted, upon the ground that the defendant was not amenable to the process of the state court at the time of the service of the summons. A writ of error was sued out under Section 238 of the Judicial Code; and the question of jurisdiction was duly certified. The order entered

below, although in form an order to quash the summons, and not a dismissal of the suit, is a final judgment; and the case is properly here. Goldey v. Morning News, 156 U. S. 518, 39 L. ed. 517, 15 Sup Ct. Rep. 559; Cowley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. Ed. 1113, 23 Sup. Ct. Rep. 728. Compare The Pesaro, 255 U. S. 216, 217, 65 L. Ed. 592, 594, 41 Sup. Ct. Rep. 308."

See also as to what is and what is not a final decree, **Empire Trust Company, et. al. v. Brooks,** 232 Fed. 641 (C. C. A. 5).

We stated above that, under Section 238 of the Judicial Code as it stood prior to the amendment of 1925, an appeal lay only from a final decree. This proposition seems first to have been decided by the Supreme Court in 1891, and consistently followed since. See:

McLish v. Roff, 141 U. S. 661, 35 L. Ed. 893.

Chicago, St. Paul, M. & O. R. Co. v. Roberts, 141 U. S. 690, 39 L. Ed. 905.

Bardes v. First National Bank, 175 U. S. 526, 44 L. Ed. 261.

See also cases cited under Note 13, Title 28, Section 345 which is the same as Section 238 of the Judicial Code.

Therefore, when the court entertained jurisdiction in the Republic Iron Company case and the cases there cited, it was of the opinion that a decree which quashed the process, dismissed the suit, and discharged the defendant was a final decree, even though it might not operate as a bar to a further proceeding.

The saving clause in the decree as written added nothing to the rights of the appellants here. The appellants would have the right of further prosecuting their

action against the appellee whether that saving clause were in the decree or not for the very apparent reason that the decree, upon its face, does not undertake to adjudicate the rights of the parties.

In the case of **King v. Wooten,** 54 Fed. 612 (C. C. A. 5) relied upon by appellee, the Court will observe that, in the first sentence of the opinion of the Court, it was stated that it was admitted by counsel for the appellant that the proceeding there was one solely for contempt. We have heretofore stated, and now reiterate that we are not asking this Court to inquire into the propriety of the action of the Court below in dismissing the citation for contempt, but we are asking this Court to determine whether or not the appellee, having been made a party to the suit in the court below, having been charged with the fraud, and having answered to the merits, was entitled to be dismissed, and whether or not an order dismissing him is a final decree.

Some reliance seems to be placed by counsel upon In re: **Chiles,** 89 U. S. 157, 22 L. Ed. 819, and it is asserted upon the authority of that case that we could not proceed for contempt and for civil relief in the same proceeding. It might well be answered that the proceeding in contempt was founded upon the citation, and it was the citation which the appellee answered. The civil proceeding was based upon the pleading from which we have quoted, and stood at issue upon that pleading, and the defendant's answer to the merits.

In In re: **Chiles, supra,** the only proceeding was one for contempt, and it will be observed that the defendants in that case was punished for the alleged contempt.

It is suggested by the Court that civil relief might also have been had on proper procedure, that is to say, proper notice, process, etc. It might have lain in the mouth of the appellee to assert that the service upon him of the copy of the supplemental bill and of the order making him a party was not in accord with the rules of the Court requiring the issuance and service of the writ

of subpoena, but the appellee did not see fit to challenge the mode of process upon him, but exercised the right of answering to the merits and seeking exonoration at the hands of the Court below. This, of course, waived any and all questions as to the kind of process and the mode of its service. See numerous authorities cited in original brief of appellants.

We, therefore, respectfully submit that the motion to dismiss the appeal should be overruled and remanded to the District Court for hearing upon the merits.

Respectfully submitted,

GREEN & GREEN,
MAYNARD, FITZGERALD & VENABLE,
ROBERSON & COOK,
By SAM C. COOK,
Attorneys for Appellants.

CERTIFICATE

I, SAM C. COOK, one of the attorneys for the appellants in the above styled cause, hereby certify that I have this day mailed, postage prepaid, to Wells, Jones, Wells & Lipscomb, Jackson, Mississippi, a true copy of the foregoing reply brief.

Tnis January 7, 1931.

SAM C. COOK.